No. 11750

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

AERONAUTICAL INDUSTRIAL DISTRICT LODGE 727, and unincorporated association,

Appellant,

vs.

JAMES L. CAMPBELL, MITCHELL B. JOPLIN, MALCOLM E. KIRK and LOCKHEED AIRCRAFT CORPORATION, a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

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Statement of Facts.

No dispute exists with reference to the facts in this case. A stipulation covering all of the facts was filed in the case by all of the parties [Tr. of Record p. 97].

The pertinent facts in summary are as follows: The petitioners and appellees, James L. Campbell, Mitchell B. Joplin and Malcolm E. Kirk, at the time of their induction into the Army were employees of appellee, Lockheed Aircraft Corporation, and were members in good standing of the appellant, Aeronautical Industrial District Lodge 727. At the time of their induction into the Army, a collective bargaining agreement was in effect between the appellant Union and the appellee, Lockheed Aircraft Corporation, governing the conditions of em-

This litigation involves the following portions of Section 8 of the Selective Training and Service Act of 1940 as amended, (50 U. S. C. A., Sec. 403, 1946 Supplement, page 48; 54 Stat. 890 (1940) as amended, 58 Stat. 799 (1944).)

> "Sec. 8 (b) In the case of any person who, in order to perform such training and service, has left or leaves a position, other than a temporary position * * * (B) if such position was in the employee of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;
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> * * * * * * * *
>
> (c) Any person who is restored to a position in accordance with the provisions of paragraph * * * (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration."

ARGUMENT.

I.

All Seniority Rights Are Based on Contractual Rights Only.

Employment in and of itself does not carry with it any inherent right to seniority. Seniority rights exist by virtue of a contractual agreement or statute only. Without a collective bargaining agreement, or other contract creating seniority rights, an employee has no inherent right to seniority.

Elder v. New York Central Railway, 152 F. (2d) 361.

In the instant case, the only rights of the petitioners and appellees to seniority rights are based on the collective bargaining agreement executed between the appellant Union and appellee, Lockheed Aircraft Corporation, and but for these collective bargaining agreements there would be no right of seniority in the petitioners and appellees.

II.

Employees' Rights to Seniority May Be Increased or Decreased or Changed from Time to Time by the Process of Collective Bargaining.

A Union certified for collective bargaining is the duly qualified and regular agent to represent its members and all other employees within its bargaining group and to bargain for them and to make valid contracts for them and on their behalf, and the employees are bound by the terms of such contracts.

McQuay Norris v. N. L. R. B., 116 F. (2d) 748; *N. L. R. B. v. John Englehorn & Sons,* 134 F. (2d) 553.

The employer is likewise bound to deal with the authorized collective bargaining agent.

> *Pueblo Gas and Fuel Co. v. N. L. R. B.,* 118 F. (2d) 304.

In the instant case there is no question that the appellant Union was the authorized bargaining agent for its employees and for the petitioner appellees as members of the Union and there is no question but that all of the employees within the bargaining unit were bound by the terms of the successive agreements.

Likewise it is not disputed that had the petitioner appellees been continuously employed at the appellee Lockheed Aircraft Corporation plants on and after June 5th, 1945, rather than having been in service with the military forces, they would have been bound in all respects by the seniority provisions of the second Collective Bargaining Agreement which became effective June 5, 1945.

III.

The Petitioner Appellees Are Not Entitled to Any Greater Seniority by Reason of Their Military Service Than They Would Have Had, Had They Been Continuously Employed on the Job During The Period That They Served in Military Service.

The Supreme Court of the United States has not yet passed upon this particular question. The particular question, however, has been decided by the United States Circuit Court of Appeals for the Third Circuit in the case of:

> *Gauweiler v. Elastic Stop Nut Corp.,* 162 F. (2d) 448 (12 Labor Cases p. 71079) decided May 20, 1947.

On the same day the Third Circuit Court of Appeals decided three other cases directly involving the same factual situation and questions of law. They were the cases of:

Koury v. Elastic Stop Nut Corp., 162 F. (2d) 544, 12 Labor Cases p. 71101;

DiMaggio v. Elastic Stop Nut Corp., 162 F. (2d) 546, 12 Labor Cases p. 71103;

Payne v. Wright Aeronautical Corp., 162 F. (2d) 549, 12 Labor Cases p. 71106.

The Third Circuit Court of Appeals, in deciding these cases cited and referred to the Supreme Court, decisions in the case of *Fishgold v. Sullivan Dry Dock and Repair Co.,* 328 U. S. 275, 66 S. Ct. 1105, 90 L. Ed. 963, 11 Labor Cases No. 51232, and the case of *Trailmobile v. Whirls,* 7 U. S. S Ct. Bulletin 1547, 67 S. Ct. 982, 12 Labor Cases No. 51247.

While portions of the Supreme Court opinion in the *Fishgold* case are cited and referred to in the *Gauweiler* case, appellant feels it desirable to call to the court's attention the following pertinent language appearing in the *Fishgold* case as follows:

> "These guarantees are contained in Section 8 of the Act and extend to a veteran, honorably discharged and still qualified to perform the duties of his old position. (1) He has a stated period of time in which to apply for reemployment. 8 (b). He is not pressed for a decision immediately on his discharge but has the opportunity to make plans for the future and readjust himself to civilian life. (2) He must be restored to his former position 'or to a position of like seniority, status, and pay.' 8 (b) (A) (B). He is thus protected against receiving a job inferior to

that which he had before entering the armed services. (3) He shall be 'restored without loss of seniority' and be considered 'as having been on furlough or leave of absence' during the period of his service for his country, with all of the insurance and other benefits accruing to employees on furlough or leave of absence. 8 (c). *Thus he does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the War.* (4) He 'shall not be discharged from such position without cause within one year after such restoration'." 8 (c). (Italics here for emphasis only.)

In defining the rights which the veteran has by way of seniority the Supreme Court used the following language:

"As we have said, these provisions guarantee the veteran against loss of position or loss of seniority by reason of his absence. He acquires not only the same seniority he had; his service in the armed services is counted as service in the plant so that he does not lose ground by reason of his absence. *But we would distort the language of these provisions if we read it as granting the veteran an increase in seniority over what he would have had if he had never entered the armed services.* We agree with the Circuit Court of Appeals that by these provisions Congress made the restoration as nearly a complete substitute for the original job as was possible. *No step-up or gain in priority can be fairly implied. Congress protected the veteran against loss of ground or demotion on his return. The provisions for restoration without loss of seniority to his old position or to a position of like seniority mean no more.*" (Italics here for emphasis only.)

Likewise the Court indicated that the provisions against the discharge of employees are relative only. The Court in that connection declared as follows:

> "Congress recognized in the Act the existence of seniority systems and seniority rights. It sought to preserve the veteran's rights under those systems and to protect him against loss under them by reason of his absence. There is indeed no suggestion that Congress sought to sweep aside the seniority system. What it undertook to do was to give the veteran protection within the framework of the seniority system plus a guarantee against demotion or termination of the employment relationship without cause for a year."

The test therefore, as laid down by the Supreme Court in the *Fishgold* case appears to be in substance, that a veteran is entitled to the same job and the same incidents therewith, as he would have enjoyed had he continued in the job as an employee doing the same kind of work throughout the time he was absent for military duty. In other words, he would be entitled to the same rights as he would have enjoyed had he remained on the job, and the Court definitely refused to accept the proposition that the veteran is entitled to any greater rights, or in other words, it denied the veteran any greater seniority than he would have had he remained on the job. The test in this case therefore, resolves itself to an examination of the rights of the petitioners and appellees had they been on the job througout the entire period that they were in military service.

The Court in the *Gauweiler* case held, that the veteran is bound by contractual changes relating to his employment made in his absence, just as he would have been

bound had he been on the job, so long as the changes were not discriminatory against veterans as such. No such contention is made here. It is respectfully submitted that the *Gauweiler, Koury, DeMaggio,* and *Payne* cases above cited are direct and controlling authority and highly persuasive authorities relative to the facts and law applicable in this case and that this Court should follow the rules laid down in these cases.

IV.

Reemployment Rights Under Selective Service Act Do Not Prevent Modification or Changes in Existing Union Contracts so Long as Such Changes Do Not Discriminate Against Veterans.

There is no question that the appellant Union and the employer appellee had the right to make modifications or changes in existing contracts nor is there any question that the agreement of June 5, 1945, was in all respects valid and binding with reference to all employees then at work. The Circuit Court in the *Gauweiler* case, and the other cases above cited, recognizes the rule that the rights of all employees to seniority, status, and pay are determined by and dependent upon the applicable provisions of collective bargaining agreements in effect between the union and employer. The Court in the *Gauweiler* case and in the other cases decided by the Third Circuit on the same day, recognized the validity of such contracts and also recognized the applicability of the provisions of such contracts to employees on military leave. The only limitation noted by the Court was that the contract not contain discriminatory provisions against veterans. In the instant case, the contract of June 5, 1945, was applicable to all employees whether veterans or not.

The *Gauweiler* case also recognized legitimate reasons for collective bargaining agreements to provide for seniority for union officials. It would appear therefore that since the employee petitioners would have been bound by all of the terms of the agreement of June 5, 1945, had they been at work at the employer's plant on and after June 5, 1945, rather than being absent on military leave, it would follow that they should be bound by the terms of the new agreement.

The reasonableness of the appellant's position is seen when it is considered that the petitioners and appellees during the entire period of their reemployment received, enjoyed and accepted without complaint all of the benefits secured for them by the new collective bargaining agreement. Only when they were confronted with a provision of the new agreement which did not please them did they demand to be restored to some of the rights they had under the old agreement.

The *Gauweiler* case is authority for the proposition that the petitioners and appellees should be bound by the provisions of the collective bargaining agreement in effect at the time of their layoff and may not rely on the agreement in effect at date of their induction into military service.

Conclusion.

Wherefore, appellant prays this Honorable Court reverse the judgment entered by the trial Court in the instant case.

Respectfully submitted,

HINDIN, WEISS AND GIRARD,
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